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No. 03-489

IN THE

Supreme Court of the United States

RICHARD B. HELFRICH, M.D.,
and DANIEL B. NELSON, M.D.,

Petitioners,

v.

CARLE CLINIC ASSOCIATION, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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FIRST QUESTION PRESENTED

Whether principles of estoppel should be applied to entitle Petitioners to recover additional pension benefits, in excess of the amounts allowed under section 415 of the Internal Revenue Code, 26 U.S.C. § 415:

a) where successful application of estoppel principles would require the pension plan to forfeit the tax benefits on which its actuarial soundness relies; and

b) where Petitioners have otherwise failed to establish the essential elements of an estoppel claim.

SECOND QUESTION PRESENTED

Whether attorneys' fees were properly awarded to Respondent under 29 U.S.C. § 1132(g), where a number of the arguments advanced by Petitioners were "wholly devoid of merit," "convoluted and strained," "less than meritorious," and "beyond zealous advocacy."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are individuals, Richard B. Helfrich, M.D., and David B. Nelson, M.D.

The Respondent is Carle Clinic Association P.C. There is no parent or publicly held company owning 10% or more of the stock of Respondent.

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STATEMENT OF THE CASE

A. Procedural Background

On September 30, 1999, Petitioners, Richard B. Helfrich, M.D. and Daniel B. Nelson, M.D. ("Petitioners" or "Dr. Helfrich" and "Dr. Nelson"), filed a four-count complaint against Carle Clinic Association ("Respondent" or "Carle") in the United States District Court for the Central District of Illinois. Counts I and III alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), specifically violations of 29 U.S.C. § 1053(a)(3)(C), 29 U.S.C. § 1054(g), and 29 U.S.C. § 1082(c)(8). Counts II and IV alleged breach of contract actions under state law. Respondent moved to dismiss Petitioners' complaint in its entirety, asserting that ERISA preempted Petitioners' state law claims, and that Petitioners' ERISA claims should have been dismissed for failure to have exhausted administrative remedies. The district court granted Respondent's motion to dismiss Petitioners' state law claims on the basis of ERISA preemption, and denied Respondent's motion to dismiss Petitioners' ERISA claims. App. 19-25. Petitioners did not appeal the district court's dismissal of their state law claims, and no issues relating to that dismissal are before the Court.

Although this case essentially concerned Respondent's a denial of Petitioners' claims for benefits subject to administrative review, Petitioners sought to engage in extensive written and oral discovery. The district court denied two motions to compel certain discovery, and one motion for reconsideration of the district court's discovery ruling. The district court, on three separate occasions, denied these improper discovery efforts.

In September 2002, the parties filed cross-motions for summary judgment. Respondent's Motion for Summary Judgment was based on materials contained in the administrative record. Petitioners, conversely, attached and cited to voluminous materials outside of the administrative record in support of their Motion for Summary Judgment. Although Respondent filed a Motion to Strike the materials *dehors* the administrative record, Respondent also responded to Petitioners' Statement of Undisputed Facts referencing those materials. On June 4, 2002, following briefing by the parties, the district court granted summary judgment in favor of Respondent, and denied Petitioners' Motion for Summary Judgment. Because the district court considered all the materials submitted by Petitioners, the district court denied as moot Respondent's Motion to Strike.

Petitioners appealed the district court's Order granting summary judgment in favor of Respondent and denying summary judgment in favor of Petitioners. App. 26-48. After the district court granted Respondent's petition for fees and expenses, App. 50-57, Petitioners timely appealed from that judgment as well. The Court of Appeals affirmed the district court's entry of judgment in favor of Respondent on the merits, and affirmed as well the district court's award of attorneys' fees and costs to Respondent. App. 1-8. The judgment in favor of Respondent on the attorneys' fees issue, however, was vacated, and remanded to the district court for a re-calculation of the amount of the fee award, with certain items deleted, and appellate fees and costs added. App. 8.

B. Carle's Defined Benefit Pension Plan

The Carle Clinic Association Pension Plan (the "Plan") at issue in this case is an ERISA-qualified funded defined benefit pension plan. Section 1.03 specifically provides that the Plan should be interpreted in such a manner that "causes the plan to comply with all applicable requirements of ERISA, the Internal Revenue Code and the regulations thereunder . . ." The Preamble of the Plan provides that

> [t]he primary purpose of this Plan is to provide for the retirement of eligible Employees of the Employer who become Participants in this Plan. It is intended that this Plan, together with the Trust Agreement, comply with the Employee Retirement Income Security Act of 1974, as amended, and the Internal Revenue Code of 1986, as amended, and the Plan shall be so interpreted to accomplish this end.

Section 4.01 of the Plan sets forth the Plan's "Standard Benefits Formula," which generally is used to compute a participant's retirement benefits. Section 4.07 of the Plan, "The Limitation On Benefits Provision," specifically provides that "any benefits payable under the Plan shall be subject to the limitations of this section," including the section 415 limitations of the Internal Revenue Code, limitations which are explicitly incorporated into the provisions of the Plan document.

The Plan's benefit levels and claims procedures are also set forth in the Plan. Pursuant to the Claims Procedure set forth in section 6.06(a) of the Plan, "the Participant may submit a written claim to the Committee describing the benefit to which he believes he is entitled. Upon receipt of

the executed form or other written notice of the claim, the Committee shall determine the benefits, if any, payable to the claimant." According to section 6.04(b) of the Plan, the Administrative Committee has the power to:

> [C]onstrue the Plan and Trust Agreement in its discretion regarding any issues arising under the Plan, including the eligibility for and amount of any benefits due to a Participant or Beneficiary, and the Committee's construction thereof shall be final and conclusive if such construction is reasonable and made in good faith.

Section 6.13 of the Plan provides that the Committee may designate persons other than named fiduciaries to carry out its responsibilities under the Plan, including the consideration of Participant's claims for benefits. The Plan provides that the claimant shall be provided with a written notice providing the specific reason for the benefits denial, specific references to pertinent Plan provisions, a description of additional material or information necessary for the claimant to perfect the claim, and information about the review process. If a claimant requests review of the denial of benefits under section 6.06(c), the "Plan Administrator shall review the disputed claim and render a decision."

C. Administrative Review of Petitioners' Claims

Petitioners participated in the administrative review process with respect to their claims for additional benefits. The Plan Administrator denied Petitioners' claims for additional benefits in excess of section 415 limitations. Following submission of Helfrich's claim, the Plan Administrator provided Helfrich's counsel a letter advising

that she had determined that Helfrich's benefits had been calculated properly and pursuant to the terms of the Plan. The Plan Administrator also provided Helfrich's counsel a letter supplementing the previous claim denial, stating in part:

> Your client is seeking benefits unreduced by limitations imposed under the Plan. I have concluded that Dr. Helfrich is only eligible for benefits reduced by the limitations imposed under the Plan. Therefore, Dr. Helfrich's claim is denied.

The letter also advised Helfrich's counsel of the basis for the denial of the claim:

> Code Section 401(a) imposed certain limitations on compensation to be considered in making contributions to a tax-qualified pension plan. Under Code Section 404, employer contributions to a defined benefit plan may not exceed the amount necessary to fund a participant benefit. Additionally, Code Section 415 limits the amount of "payout" a participant may receive annually. Therefore, the Code limits both the amount of benefits a participant may receive and the amount that an employer can contribute to fund those benefits. The Plan incorporates both of the limitations under Code Sections 401(a)(17) and 415 limitations in Sections 1.01 and 4.07, respectively.

Dr. Helfrich formally requested a review of the decision to deny his claim for additional benefits. In his request, Dr. Helfrich's counsel did not submit "any documents or other information supporting why the limitations did not apply or that the Plan provisions are not as described," as he had been

advised to do by the Plan Administrator in her denial letter. Helfrich's counsel also did not dispute the Plan Administrator's conclusion that "[i]f the Plan were to pay Dr. Helfrich additional amounts, whether as a lump sum of $400,000 (as you requested) or any other amounts, this would violate the provisions of the Plan because the payment or payments would be in excess of the benefit formula and Code limitations." Indeed, Dr. Helfrich's counsel acknowledged that "it may have become impractical to provide Dr, [sic] Helfrich's full benefits through the existing defined benefit plan . . ." He instead argued that "that does not prevent Carle from making good on its promise; it merely requires payment through a separate pension plan, which may or may not have favorable tax treatment." The Plan Administrator advised Helfrich's counsel that she had reviewed Helfrich's request for review and "concluded that the decision that Dr. Helfrich is only eligible for benefits subject to the limitations imposed under the Plan is the correct decision. Therefore, the denial of Dr. Helfrich's claim stands."

Dr. Nelson submitted a claim for benefits four days after final denial of Dr. Helfrich's administrative appeal. In detailed responsive letters, both Dr. Nelson's claim and his administrative appeal were denied.

D. Petitioners' Decision Not To Participate In The One-Time Lump Sum Payment Made By Carle

Petitioners had corresponded with Respondent and its Board of Governors directly regarding the excess pension benefit issue. The Board of Governors had offered a lump sum payment in 1996 before any of these proceedings to all twenty physicians affected by the Section 415 limitations. This payment had been offered to Petitioners, but they chose

not to accept the lump sum payment in order to continue to negotiate with the Board and, ultimately, pursue the claims at issue. Sixteen other physicians, however, signed waivers of further pension benefit claims and then received the lump sum payments offered in 1996.

E. Discovery

Petitioners served Plaintiffs' Second Set of Interrogatories and Second Request for Production of Documents to Defendant requesting information and documents outside of the administrative record. Respondent served Responses and Objections, contending that such information and documents were inappropriately sought in this case because discovery was properly limited to the administrative record. In response, Petitioners filed Motions to Compel. The district court held that the language in the Plan conferred discretion to the Plan Administrator. Accordingly, the district court determined that it would apply deferential review to the Plan Administrator's decision. The district court found, on the record before it, "no specific evidence of actual bias or a significant conflict of interest." Consequently, the district court denied Petitioners' motion to compel and held that discovery would be limited to the administrative record. As a separate and independent basis for denial, the district court noted that Petitioners had failed to confer or submit an affidavit they had conferred, as required by Fed. R. Civ. P. 37.

Following the district court's denial of their motion to compel, Petitioners filed a Motion for Reconsideration of Order Denying Discovery, which was supported by additional documentation. Because the additional evidence submitted by Petitioners had been available to them prior to filing their initial

motion (or could have been obtained with reasonable diligence), the district court denied Petitioners' motion to reconsider.

Petitioners sought yet more additional discovery outside of the administrative record after the district court had denied their motion to compel and motion to reconsider. Specifically, Petitioners sought to depose the Plan Administrator. The district court denied Petitioners' Motion to Compel Deposition. In its ruling, the district court saw "no reason to explain for a third time the reasons why the standard of review to be applied by this court is deferential nor why discovery is necessarily limited to the administrative record."

F. Motions For Summary Judgment

All parties filed for summary judgment. Petitioners argued that Respondent had amended its plan in 1989 and 1994 by changing the calculation of benefits formula in the Plan, thereby allegedly retroactively reducing participants' accrued benefits in violation of ERISA, 29 U.S.C. §§ 1053(a)(3)(C), 1054(g), and 1082(c)(8). Petitioners argued that the purported amendments to the Plan affected the calculation of their benefits and asserted that Respondent was required, but had failed, to create a summary plan description reflecting the amendments and the alleged change in benefit calculation. Petitioners also argued, although they had never asserted an estoppel claim in their complaint, that Respondent was barred under the doctrine of estoppel from denying their claims for additional benefits.

Respondent sought summary judgment on the basis that the Plan Administrator's decision to deny Petitioners' claims for additional benefits was proper, and, therefore, must be upheld by the court. Respondent also moved for summary

judgment on the basis that plaintiffs failed, as a matter of law, to establish the ERISA violations alleged in their Complaint. Because Petitioners submitted information and documents outside of the administrative record, Respondent filed a Motion to Strike Plaintiffs' Statement of Facts and Supporting Exhibits.

Respondent also contended that Petitioners had waived the newly asserted estoppel theory by first raising it at summary judgment and not presenting an estoppel argument to the Plan Administrator or including an estoppel theory in their Complaint. If considered, Respondent urged the district court to reject Petitioners' estoppel claim, because the estoppel doctrine does not extend to funded qualified pension plans, particularly where, as here, such extension could threaten the actuarial soundness of the Plan. Respondent also argued that Petitioners had failed to establish the elements of estoppel.

G. The District Court's Summary Judgment Decision

The district court denied Petitioners' Motion for Summary Judgment, and granted Respondent's Motion for Summary Judgment. Reiterating that the Plan Administrator's decision to deny benefits was entitled to deferential review, the district court reviewed the evidence to determine whether Petitioners had established that the Plan Administrator's decisions were arbitrary or unreasonable.

The district court considered all of the arguments and all of the documents (even those outside of the administrative record submitted by Petitioners) and ultimately held that "this Court has reviewed all documents submitted by the [Petitioners], and this Court is convinced that not only were

the decisions of the Plan Administrator not 'downright unreasonable,' they were downright correct." (App. 41). Having reviewed the Plan Administrator's decisions, the district court indicated:

> In her decisions denying [Petitioners] benefits, the Plan Administrator provided detailed reasons for the application of benefit limitations. In her letter to Helfrich, [the Plan Administrator] indicated that paying the benefits requested would exceed the limits imposed by §415 of the Code and incorporated into the Plan in §§1.01 and 4.07. Section 415 of the Code states that "[b]enefits with respect to a participant exceed the limitation of this subsection if, when expressed as an annual benefit . . . , such annual benefit is greater than the lesser of (A) $160,000, or (B) 100 percent of the participant's average compensation for his high 3 years." 26 U.S.C. §415(b)(1). If these limits are exceeded, the Plan could lose its tax qualified status pursuant to 26 U.S.C. §401(a)(16) which states that "[a] trust shall not constitute a qualified trust . . . if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of §415."

App. 38-39. The district court rejected as "wholly devoid of merit" Petitioners' argument that the requested pension benefits would not exceed the limits imposed by the Internal Revenue Code. App. 40.

The district court also rejected Petitioners' argument that purported procedural irregularities in the administrative review process entitled them to judgment in their favor.

The district court found "[Petitioners'] qualms with quality and timing of denial letters have no impact upon the correctness of the Plan Administrators' decision." App. 40. The district court described Petitioners' arguments in this regard as being "convoluted and strained." App. 41.

Rejecting Petitioners' retroactive reduction of benefits claims, the district court found that argument "untenable." App. 43. Specifically, the district court noted that Petitioners had failed to explain how the change in the actual formula (the 1989 amendment to which plaintiffs object) would affect pension benefits and concluded that, in fact, the two formulas resulted in the same amount of pension benefits. App. 43 n.1. Acknowledging that "plaintiffs seem to be arguing that the inclusion of IRS limitations, specifically Section 415 limitations, in the 1989 plan resulted in a reduction in accrued pension benefits," the district court rejected Petitioners' argument, because, in fact, the Section 415 limitations had been included in the Plan since 1976.

The district court also rejected Petitioners' request to estop Respondent from denying Petitioners' claims for benefits under the Plan, because "while the Seventh Circuit has not foreclosed the possibility of extending the estoppel doctrine in ERISA cases to funded plans, this Court does not believe, based upon the facts of the instant case, that the doctrine should be applied here where [Petitioners'] claims are less than meritorious." App. 45-46. Finally, the district court rejected Petitioners' argument that Respondent had violated ERISA by not producing a summary plan description of the 1989 plan allegedly reducing the accrued benefits. Specifically, the district court held that because the placement of Section 415 limits in the 1989 plan did not constitute a material modification of the plan, since the limitations had been

included in the plan since 1976, Respondent was not required to provide a summary plan description. App. 46. The district court further noted that even if Respondent had failed to prepare a summary plan description, it could "hardly be construed 'direct evidence that Carle made knowing misrepresentations to the Plaintiffs and other employee-physicians' as Plaintiffs would have this Court believe." App. 46.

H. The District Court's Attorneys' Fees Decision

In its Summary Judgment Order, the District Court allowed Respondent thirty days "to file a petition for fees pursuant to 29 U.S.C. § 1132." App. 48. Respondent thereafter submitted a Petition for Attorney's Fees and Expenses, which sought reimbursement for $160,766.36 in fees and expenses.

Petitioners objected to an award of fees, contending that the arguments they advanced had been substantially justified, and that the amount of fees Respondent had requested was unreasonable. Petitioners argued that the billing rates of Respondent's attorneys were too high, and also lodged specific objections to billing entries totaling slightly more than $13,500.

The district court overruled Petitioners' objections and awarded Respondent the fees and expenses it had requested. App. 50-57. In so ruling, the district court stated as follows:

> Based on the protracted discovery proceedings and the untenable legal arguments, this court finds in its discretion that [Petitioners'] position was not substantially justified and that they failed to act

> in good faith in prosecuting this lawsuit. First, [Petitioners'] legal arguments were frivolous. They continued to seek benefits not allowed by the plan without providing legal justification for doing so. This court found the Plan Administrator's decision to be not only not "downright unreasonable," but also "downright correct." But [Petitioners] attempted to rely on inapplicable code sections and advanced arguments based on minute procedural errors. As noted in this court's summary judgment order, some of [Petitioners'] contentions were "wholly devoid of merit," "convoluted and strained," and "less than meritorious."
>
> Second, [Petitioners] filed repetitive motions and continually disputed this Court's discovery orders. . . . This behavior, which is beyond zealous advocacy, was not substantially justified or in good faith. Accordingly, [Respondent] is entitled to attorneys' fees.

App. 52-53.

I. The Decision of the Court of Appeals

The Court of Appeals affirmed the district court's entry of judgment in favor of Respondent on the merits. The Court of Appeals also affirmed the district court's decision to award attorneys' fees to Respondent. Nonetheless, because the Court of Appeals ruled that Respondent should not have been reimbursed for certain items in the fee petition, it vacated the attorneys' fee award, with instructions to delete certain items, and to add the cost of the appeal to any attorneys' fee award ultimately rendered upon remand. App. 8.

REASONS FOR DENYING THE PETITION

I. No Authority Supports Petitioners' Argument That Estoppel Principles Entitle Pension Plan Participants To Recover Pension Benefits In Excess Of The Amounts Allowed Under Section 415, And No Conflict Exists On The Issue

This Petition arises from the claims of two pension plan participants to recover monthly pension benefits in an amount that exceeds the limitation imposed by the Internal Revenue Code and by the Plan. Since 1974, Section 415 of the Internal Revenue Code, 26 U.S.C. § 415 has imposed maximum limits on the amount of benefits to be received from defined benefit plans, such as that at issue here. The purpose of these limitations is to prevent partial public financing of excessively large retirement benefits through tax subsidiaries. H.R. Rep. No. 807, 93rd Cong., 2d Sess. 35 (1974). As the Court of Appeals noted, the amount of the limitation has changed over time, and making payments in excess of limitations provided in Section 415 "would cost the [P]lan its 'tax-qualified' status." App. 2.

Petitioners have not cited a single decision that has addressed the issue of whether principles of estoppel authorize a pension plan participant to recover additional pension plan benefits in excess of section 415 limitations. The decision below does not conflict with any of the Court's opinions or with the opinions of any other court of appeals. The Court should deny the Petition for this reason alone.

The purported conflict advanced by Petitioners is a false conflict not warranting review by the Court. Indeed, the eleven cases cited by Petitioners in their review of the Circuits

present questions quite different from the question truly at issue here. First, of the eleven cases cited by Petitioners, five involve welfare plans, not pension plans. *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 85 (2d Cir. 2001), *cert. denied sub nom. Empire Blue Cross & Blue Shield v. Byrnes*, 537 U.S. 809 (2002) (health benefits); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998) (health benefits); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579 (7th Cir. 1999) (health benefits); *Jensen v. Sipco, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied sub nom. Sipco, Inc. v. Jensen*, 514 U.S. 1050 (1995) (health benefits); *Katz v. Comprehensive Plan of Group Insurance, Alltel*, 197 F.3d 1084 (11th Cir. 1999) (life insurance benefits).

This distinction is important. In cases involving welfare plans, which typically have no statutory vesting and accrual requirements, there is ordinarily no particular fund which is depleted by the payment of benefits. Hence, unlike pension plans, concerns about the actuarial soundness of such welfare plans have no place. *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). Estoppel claims involving welfare plans are considered differently than estoppel claims involving pension plans as the Court of Appeals recognized:

> Whether, and to what extent, estoppel is available *with respect to welfare benefit plans* under ERISA is an issue on which the judiciary has not come to rest (citations omitted).

App. 5 (emphasis supplied). Petitioners have appropriated language from that quotation for use in the First Question

Presented, but have omitted the quotation's restriction to "welfare benefit plans." The First Question Presented reads:

> Whether and under what circumstances the doctrine of estoppel should be applied to *benefit plans* governed by the Employee Retirement Income Security Act ("ERISA"), where conflict exists among the Circuits as to the application of estoppel to ERISA claims.

(Petition, at i). Nowhere is the falsity of Petitioners' purported "conflict" more apparent than in the erroneous attempt to attribute the appellate panel's comments about welfare plans to all "benefit plans" and all "ERISA claims."

Of the six remaining cases purportedly giving rise to a conflict justifying the Court's review, two involve delinquent contributions claims where the Plan seeks to recover money from a delinquent employer. *Bakery and Confectionery Union and Industry Int'l Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018 (4th Cir. 1997); *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881 (9th Cir. 1996). These cases likewise have no bearing on the resolution of the true issue presented here, because concerns for protecting the actuarial soundness of a pension plan are absent from such cases. *Alaska Trowel Trades*, 104 F.3d at 884, *citing Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992); *Davidian v. Southern Cal. Meat Cutters Union*, 859 F.2d 134, 136 (9th Cir. 1988).

The remaining decisions on which Petitioners rely to support the existence of purported conflict do not support Petitioners' argument. In *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied sub nom. Miller v.*

Pension Plan for Employees of Coastal Corp., 507 U.S. 987 (1993), the Tenth Circuit refused to apply principles of estoppel to a pension plan participant's claims, holding that "there is no liability under ERISA for purported informal written modifications to an employee benefit plan." In *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 58 (1st Cir. 2001), the First Circuit affirmed the entry of summary judgment in favor of the defendant on the pension plan participant's estoppel claim, holding that "there is not a more general equitable estoppel claim based solely on an inadequate Plan Summary." In *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corp.*, 215 F.3d 475 (8th Cir. 2000), the pension plan participant did not assert estoppel affirmatively as a theory of recovery. Rather, the participant merely sought to estop the plan from asserting the defense of the statute of limitations. Finally, in *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation*, 334 F.3d 365 (3d Cir. 2003), the Third Circuit held that when a summary plan description under ERISA conflicts with the terms of the pension plan, a participant may state a claim for benefits based upon terms contained in the summary plan description. In so ruling, however, the Third Circuit reaffirmed its earlier ruling in *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3d Cir.), *cert. denied*, 501 U.S. 1232 (1991), that estoppel claims cannot be based on informal documents describing plan benefits, but lacking the formality of a summary plan description, such as the brochures at issue in this Petition.

In view of all of these precedents, the Court of Appeals below was manifestly correct in ruling that:

> . . . with respect to pension plans (which by statute must be very formal) the only variance that any

> court has allowed depends on the plan's own writings, such as summary plan descriptions.

App. 5. No conflict exists among the courts of appeal on the true issue presented in this case.

Absent supportive case law, Petitioners are left to cite as their principal authorities three district court decisions from district courts within the Seventh Circuit itself. *Kuehl v. Chrysler Pension Plan*, 895 F. Supp. 1147 (E.D. Wis. 1995); *Stanek v. AT&T*, No. 96-C-4096, 1997 U.S. Dist. LEXIS 3716 (N.D. Ill. March 28, 1997); *Lockery v. Leavitt Tube Employees Profit Sharing Plan*, 766 F. Supp. 1510 (N.D. Ill. 1991). A purported conflict between a court of appeals decision and a prior district court decision from a district court within that Circuit does not constitute a "compelling reason" within the meaning of Supreme Court Rule 10 to justify review on writ of certiorari.

The three district court decisions cited by Petitioners do not support Petitioners' argument and do not conflict with the Court of Appeals' decision below. None of the three decisions involves a claim for additional benefits in excess of section 415 limitations. None of the three decisions raises concerns about the actuarial soundness of the pension plan. None addresses a situation, like that present here, where statements made in informal documents did not predict the effect of future legislative changes.

Kuehl v. Chrysler Pension Plan, 895 F. Supp. 1147 (E.D. Wis. 1995) involved "a unique and unfortunate situation", *Id.* at 1152, where the plaintiff had been supplied incorrect factual information concerning the proper calculations of his credited service time. Although serious questions remained

about plaintiff's justifiable and detrimental reliance, the district court believed that application of estoppel principles under the circumstances of that case did not raise concerns about the actuarial soundness of the Plan. *Stanek*, too, involved a promissory estoppel claim based upon alleged misrepresentations to an individual about the treatment of his service credits. The district court in *Stanek* simply denied a motion to dismiss the promissory estoppel claim where it had been alleged that the actuarial soundness of the pension plan in question would not be adversely affected by the individual claim at issue. Finally, in *Lockery*, plaintiff challenged a statement that supplied erroneous factual information about his retirement entitlement. Indeed, the district court in *Lockery* rejected the Plan's argument that the statements made to the pensioner truthfully reflected the terms and workings of the Plan in effect when they were made. Here, conversely, the Court of Appeals, acknowledging the changes in Section 415 limitations through the years, ruled as follows:

> . . . it is hard to see why employers should ensure their employees against legislative change. But for amendments to the tax code, even the unguarded language of the "summaries" would have held. Many people are disappointed, and their fortunes affected by statutory change; this does not imply that some private party must step in to undo the effects of the legislation. The "summaries" described extant pension plans; they did not include promises to protect employees from the transition effects of statutory change.

App. 7. The three district court decisions neither support plaintiffs' estoppel argument nor conflict with the decision below. The Court should deny the Petition.

II. Petitioners, As A Factual Matter, Failed To Establish The Elements Of Promissory Estoppel

Petitioners raised the estoppel argument at issue in this Petition as an afterthought at the summary judgment stage of the case. The estoppel claim had not been alleged in any counts of Petitioners' Complaint, and no form of the word "estoppel" appears in the Complaint. Although Respondent had argued that the summary judgment phase of the case was too late to raise estoppel as a theory of recovery for the first time, and that the courts below should not have considered the argument, *Auston, IV v. Schubnell*, 116 F.3d 251, 255 (7th Cir. 1997); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 665 (7th Cir. 1997), both courts below indulged Petitioners' untimeliness and considered the merits of the estoppel argument. Notwithstanding this indulgence, the Court of Appeals noted that Petitioners' argument was "sketchy," App. 7, and that portions of the argument had not been made "expressly." App. 6. In particular, the Court of Appeals ruled that with respect to the argument that estoppel principles required Respondent to create an additional plan, "plaintiffs have not made this argument explicit" and therefore Respondent "was not put on notice of the need to discuss its effects." App. 6. The Court should deny the Petition for the additional reason that the estoppel theory was neither made expressly nor fully developed below.

Petitioners failed to establish the essential elements of an estoppel claim. The estoppel claim ostensibly pursued by Petitioners has four elements: (1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation by the plaintiff; (4) to his detriment. *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. 1999). The Court of Appeals rejected Petitioners' arguments on virtually all of these elements. With respect to the lack of a knowing

misrepresentation made in writing, the Court of Appeals ruled that "[t]he 'summaries' described extant pension plans; they did not include promises to protect employees from the transition effects of statutory change." App. 7. Moreover, the Court of Appeals recognized that "[a]n argument for creating still a third plan, limited to [Respondent's] best-paid physicians, has no support in the documentation." App. 6. Finally, with respect to the nature of the written representation, the Court of Appeals, noting the informality of the brochures at issue here, correctly ruled that "documents prepared by an employer do not supersede those documents that establish the terms of a pension plan." App. 5.

With respect to the reliance issues, the Court of Appeals rejected Petitioners' undeveloped argument that they had been injured by a failure to pay additional benefits for the Plan. In so ruling, the Court of Appeals correctly observed as follows:

> [w]e cannot imagine a good claim of estoppel that would require a plan to forfeit the tax benefits on which its actuarial soundness relies. [Petitioners'] position, if accepted, would cost [Respondent], their co-workers, and themselves considerable sums in taxes. . . . Overriding the plan's terms to achieve that dubious end is not a proper function of an equitable doctrine.

App. 5-6. Petitioners have failed to establish the essential elements of an estoppel claim, and, given the undeveloped nature of that claim, the Court should deny the Petition.

III. The Court Of Appeals Did Not "Create," Much Less Rely Upon, A Presumption In Favor Of Awarding Attorneys' Fees

Petitioners' second question presented, i.e., "[w]hether a presumption should be granted to a prevailing party requesting an award of attorneys' fees and costs under Section 1132 of ERISA, where the majority of circuits do not extend that presumption," is not involved in this case. Contrary to Petitioners' argument (Petition, p. 16), the decision of the Court of Appeals did not "create" a presumption in favor of prevailing ERISA litigants to an award of attorneys' fees. Indeed, the Court of Appeals' decision did mention any such presumption, and not one of the decisions cited by Petitioner as supporting the existence of a conflict was referenced by the Court of Appeals below.

This is not surprising given that Petitioners did not challenge, or for that matter, address the existence of an attorneys' fee presumption in the courts below.[1] The Petitioners' challenge to the presumption is waived. Rather, having considered the parties' discussion of the facts of the underlying case to the relevant factors governing awards of attorneys' fees in ERISA cases, the Court of Appeals correctly concluded:

> As for attorneys' fees: the district court did not abuse its discretion in concluding that [Respondent], the prevailing party, is entitled to recompense under 29 U.S.C. § 1132(g)(1), which says that "the court

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1. Petitioners first challenged the existence of an attorneys' fee presumption on rehearing in the Court of Appeals. An issue raised for the first time on rehearing is waived. *United States v. Weems*, 322 F.3d 18 (1st Cir.), *cert. denied*, __ U.S. __, 72 U.S.L.W. 3242 (U.S. Oct. 6, 2003).

> in its discretion may allow a reasonable attorney's fee and costs of action to either party."

App. 7. The Court of Appeals simply affirmed, after reviewing the parties' positions, the district court's exercise of discretion on the attorneys' fees issue, which involved an application of well-established legal principles to the facts of this case.

The Court should deny the Petition, because the purported conflict is irrelevant to the ultimate disposition of the attorneys' fee issue. Although the district court referenced the existence of a "modest presumption" in favor of awarding attorneys' fees to prevailing ERISA litigants, App. 51, *citing Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 464 (7th Cir. 2001), neither the district court nor the Court of Appeals relied upon a presumption in issuing its decision. As demonstrated below, the district court cited to numerous factual bases in the record before it to justify the award of attorneys' fees. App. 52-53. The Court should therefore deny the Petition for the additional reason that the resolution of the attorneys' fee issue is factually intensive, and the Court should not review factual findings of the district court that have been affirmed by a unanimous panel of the Court of Appeals.

IV. Attorneys' Fees Were Properly Awarded To Respondent Under 29 U.S.C. § 1132(g) Where Petitioners' Arguments Were, In The Words Of The District Court, "Wholly Devoid Of Merit," "Convoluted And Strained," And "Less Than Meritorious"

The district court's exercise of discretion in awarding attorneys' fees, affirmed by the Court of Appeals, was manifestly correct. Petitioners do not dispute that a prevailing

defendant in an ERISA case may, in the discretion of the district court, be awarded attorneys' fees. *See, e.g., Bittner v. Sadoff & Rudof Industries*, 728 F.2d 820 (7th Cir. 1984). Indeed, the plain language of 29 U.S.C. § 1132(g) authorizes such a result. That section provides that "[i]n any action under this title . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." 29 U.S.C. § 1132(g)(1) (emphasis supplied).

Two frameworks have developed to assess a party's entitlement to attorneys' fees in ERISA actions brought by participants, beneficiaries, or fiduciaries. Under either framework, Respondent was entitled to recover its attorneys' fees in this case. One approach looks to the following five factors:

(1) the degree of the defending parties' culpability or bad faith;

(2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees;

(3) whether or not an award of attorneys' fees would deter other persons acting under similar circumstances;

(4) the amount of benefit conferred on members of the Pension Plan as a whole; and

(5) the relative merits of the parties' positions.

Nichol v. Pullman Standard, Inc., 889 F.2d 115 (7th Cir. 1989).

The district court used the second approach, under which fees are awarded to the prevailing party unless either "(1) the losing party's position was substantially justified or (2) special circumstances make a fee award unjust." *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 272 F.3d 1000, 1004 (7th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002). The "substantially unjustified" test employed by the district court was the test urged by Petitioners themselves in the courts below. As the Seventh Circuit stated: "the various formulations boil down to the same bottom-line question: 'Was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?'" *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 464 (7th Cir. 2001) (citations omitted). Applying this test, the district court found "in its discretion that [Petitioners'] position was not substantially justified and that they failed to act in good faith in prosecuting this lawsuit." App. 52. In support of this conclusion, the district court found that "[Petitioners'] legal arguments were frivolous" and that Petitioners had "filed repetitive motions and continually disputed this court's discovery orders." App. 52. The district court, in its attorneys' fee ruling, reiterated that it had previously found some of Petitioners' contentions to be "wholly devoid of merit," "convoluted and strained," and "less than meritorious." App. 52.

Even had the district court applied the five-factor test, all of the five factors supported an award of fees to Respondent. First, with respect to Petitioners' culpability or bad faith, Petitioners had advanced a number of substantially unjustified arguments. For example, Petitioners' principal argument that the benefits plaintiffs sought would not exceed the limits on pension benefits imposed by Section 415 of the

IRC was rejected by the district court as "wholly devoid of merit" – and Petitioners did not pursue that theory on appeal. The district court also found that Petitioners' argument concerning alleged irregularities in the claims review process was "convoluted and strained." App. 41. Most important, with respect to the merits of Respondent's claim determination, the district court found that "not only were the decisions of the Plan Administrator not 'downright unreasonable,' they were downright correct." App. 41. Finally, in repeatedly seeking discovery not permissible under established law, Petitioners had sought to circumvent ERISA's claim resolution procedures. Petitioners' efforts to protract the proceedings made the case more expensive to defend than it otherwise should have been. Had Petitioners succeeded in the procedural course they sought to pursue, the attorneys' fees and costs would have been much higher.

With respect to the second factor, *i.e.*, Petitioners' ability to personally satisfy an award of attorney's fees, it should be noted that Petitioners are professionals who have worked as physicians for many years. Moreover, the nature of Petitioners' claim is one to circumvent the *maximum limits* for pension payments to highly compensated employees. Finally, given that there are two Petitioners, neither will be required to pay the full attorneys' fee award, unless the other defaults.

The third factor, *i.e.*, whether or not an award of attorneys' fees will deter other persons acting under similar circumstances, particularly favors an award of attorney's fees here. Although sixteen physicians accepted Respondent's offer, two physicians other than Petitioners have not. An award of attorneys' fees would send a clear message that similar claims ought not be brought.

The fourth element, *i.e.*, the amount of benefit conferred on members of the Plan as a whole, strongly supports an award of attorneys' fees. Here, the two Petitioners broke ranks from the overwhelming majority of their colleagues and rejected a settlement offer to pursue substantially unjustified claims. No benefits were to be conferred on other participants. In fact, by seeking to recover more than their colleagues, Petitioners undoubtedly undermined Respondent's efforts to achieve a global resolution that treated affected staff physicians equally.

The last element, *i.e.*, the relative merits of the parties' positions, is the element that most strongly favors Respondent. As has been previously demonstrated, virtually every position – both legal and factual – advanced by Petitioners has ultimately been repudiated by the district court and by the Court of Appeals. The factual record before the district court, as reviewed by the Court of Appeals, amply supported the award of attorney's fees under any standard, regardless of whether a legal presumption exists. The Court should deny the Petition.

CONCLUSION

For all of these reasons, the Petition should be denied.

Respectfully submitted,

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